A **KANDARAJU FRAPATAN**

v.

MBF FINANCE BHD

B HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 1-12-19-2005]
29 JUNE 2006

C ***CIVIL PROCEDURE:*** *Judgment - Setting aside - Application to set aside default judgment - Whether made within thirty days - Whether there was inordinate delay - Subordinate Courts Rules 1980, O. 29 r. 14*

D ***CIVIL PROCEDURE:*** *Service - Summons - Service of summons - Whether duly served - AR registered post - Absence of defendant's signature on AR card - Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor - MBf Finance Bhd v. Tiong Kieng Seng - Whether service was effected*

E ***CIVIL PROCEDURE:*** *Default judgment - Setting aside - Application for - Whether default judgment a regular judgment - Whether defendant raised no defence on merits - Whether appeal dismissed*

This was an appeal by the appellant-defendant ('the defendant') F against the decision of the sessions court judge dismissing the defendant's application ('the application') which sought for an extension of time to file the application to set aside the default judgment ('the default judgment') and for the default judgment to be set aside. The defendant was a guarantor in respect of the hire G purchase agreement ('the agreement') executed between the respondent-plaintiff ('the plaintiff) as owner and the first defendant as hirer. It was submitted that the defendant was only aware of the action when he received the bankruptcy notice and had never received a copy of the default judgment. The issues that arose H were (a) whether the summons had not been duly served on the defendant as the signature on the AR card was not the defendant's, as a result of which the judgment obtained by the plaintiff was not a regular judgment; (b) whether on 8 January 1998 when the plaintiff obtained the judgment in the sum of I RM89,812.96 together with interest, the agreement had not been terminated, as the plaintiff's notice of demand dated 17 January

1997 was to recover the instalments of arrears only, and so it was contrary to the guarantee and (c) whether the defence raised no defence on merits.

Held (dismissing the appeal):

(1) The plaintiff's letter was sent by way of certificate of posting on 13 February 1998 enclosing a copy of the default judgment to, *inter alia*, the defendant at the defendant's address which was identical to that given by the defendant in his own affidavit and the guarantee executed by the defendant in favour of the plaintiff. The defendant's submission that the defendant had not received the default judgment was unacceptable. (para 6)

(1a) Order 29 r. 14 of the Subordinate Courts Rules 1980 made it clear that the defendant who wished to set aside a default judgment obtained against him must make the application and serve it on the plaintiff within thirty days after 13 February 1998 when the judgment was sent by way of certificate of posting to his address. The defendant herein made the application and served it on the plaintiff on 5 October 2004 only, thereby occasioning an inordinate delay of six and a half years. (paras 8 & 9)

(2) The issue pertaining to the absence of the defendant's signature on the AR card has been resolved by the courts. *Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor* held that there was no indication in O. 10 r. 1(1) of the Rules of the High Court 1980 that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it and it was construed that the defendants had constructive notice of the issuance of the summons and so, in the absence of rebuttal evidence, good service of the writ had taken place. In *MBf Finance Bhd v. Tiong Kieng Seng*, it was explained that in postal service, compliance with stipulated rules would suffice to invite the presumption under s. 12 of the Interpretation Acts 1948 and 1967 that service has been effected, as the party resorting to postal service has only to show proof of posting to enable him to rely on the presumption of service. The position herein demonstrated a strikingly similar situation in both the aforementioned cases. This court was unable to uphold the submission advanced for the defendant. (paras 30, 31 & 32)

(3) The plaintiff's right to terminate the agreement was found in cl. 5(a) of the agreement executed between the plaintiff as the owner and the first defendant as hirer. This court was dutybound to give effect to the intention of the contracting parties thereto *ie*, under the circumstances stated therein, the owner may exercise the right to terminate the agreement without any notice. The authorities on which the defendant sought to rely were not conducive to the defendant's contention. On the above grounds, the default judgment was a regular judgment to which the defendant had raised no defence on merits. (paras 36, 37, 55 & 56)

[Affirming decision of the court below.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors [1999] 4 CLJ 441 HC ***(refd)***

C Paul D'Cruz v. Chow Tai Yow & Sons Sdn Bhd [1998] 4 CLJ Supp 389 HC ***(refd)***

Colonel Lim Poh Weng & Anor v. Probo Pacific Leasing Pte Ltd [1993] 3 SLR 662 ***(refd)***

Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corpn & Anor [1976] 1 MLJ 83 HC ***(refd)***

Development & Commercial Bank Ltd v. Dinesh Kumar Jashbhai Nagjibhai & Ors [2002] 3 CLJ 108 HC ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 CLJ 335 CA ***(refd)***

Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd [1998] 3 CLJ 619 CA ***(refd)***

Low Ping Ming v. MBF Finance Bhd [2000] 2 CLJ 307 HC ***(refd)***

Malayan Credit Ltd v. Mohamed Kassim [1965] 2 MLJ 134 HC ***(refd)***

MBF Finance Bhd v. Cahaya Luas Sdn Bhd & Ors [2002] 5 CLJ 32 HC ***(refd)***

MBF Leasing Sdn Bhd v. Cheok Lai Chen & Anor [2003] 7 CLJ 186 HC ***(refd)***

MBF Finance Bhd v. Low Ping Ming [2005] 1 CLJ 305 CA ***(refd)***

MBF Finance Bhd v. Tiong Kieng Seng [2001] 4 CLJ 38 HC ***(refd)***

Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd [2003] 4 CLJ 533 CA ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

OCBC Bank (M) Bhd & Anor v. Livision Sdn Bhd & Ors [2001] 5 CLJ 433 ***(refd)***

Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor [2003] 6 CLJ 326 HC ***(refd)***
Public Bank Bhd v. Chan Siok Lie & Ors [1989] 2 MLJ 305 HC ***(refd)***
Sungai Way Leasing Sdn Bhd v. Goh Nai Khoo [1997] 2 CLJ Supp 541 HC ***(refd)***
Thambipillai v. Borneo Motors (M) Ltd [1970] 1 MLJ 70 FC ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 12
Post Office Rules 1947, O. 7 r. 7A
Rules of the High Court 1980, O. 7 r. 1(1), O. 10 r. 1(1), O. 29 r. 14, O. 42 r. 13
Subordinate Courts Rules 1980, O. 3 r. 5(1), O. 29 r. 14, O. 53 r. 11

For the plaintiff - TT Leong; M/s Tunku Amirrudin & KK Chew
For the defendant - Nur Azlin Anuar - A Rengganathan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

[1] This is an appeal by the appellant-defendant ("the defendant") against the decision of the learned sessions court judge who had on 2 February 2005 dismissed the defendant's application dated 5 October 2004 ("the application") which sought *inter alia* the following orders:

(1) extension of time to file the application to set aside the default judgment dated 8 January 1998 ("the default judgment"); and

(2) the default judgment be set aside.

Factual Background

[2] In the court below, the defendant was defendant 2 against whom the default judgment has been entered. He was a guarantor in respect of the hire-purchase agreement ("the agreement") dated

10 June 1996 executed between the respondent-plaintiff ("the plaintiff") as owner and the first defendant as hirer. The defendant alleged that:

(1) he was unaware of the action against him;

(2) he had never received any summons, statement of claim and judgment from the plaintiff or the plaintiff's solicitors and that he was only aware of the same on 18 June 2004 when he was served with the bankruptcy notice dated 24 May 2004 ("the bankruptcy notice");

(3) he was facing financial difficulties as a pensioner and was unable to immediately retain professional legal services;

(4) subsequently after obtaining financial aid from members of his family, he retained the services of his present solicitors; and

(5) the signature on the A.R. card effecting service of the summons and statement of claim (collectively, "the summons") at Batu 16½ Kg. Baru, 77200 Bemban Melaka was not his and he had never received the summons.

[3] A reference hereinafter to an order and a rule is a reference to that order and rule in the Subordinate Courts Rules 1980, unless otherwwise stated or the context otherwise requires.

Delay

[4] It was submitted by Mr. A. Rengganathan learned counsel for the defendant that the defendant's application was filed pursuant to O. 29 r. 14, O. 53 r. 11 and O. 3 r. 5(1) as the defendant was only aware of the action when he received the bankruptcy notice and has never received a copy of the default judgment, adding that the defendant's application had been filed within the 30 days prescribed under O. 29 r. 14. The following authorities were cited:

(1) *Development & Commercial Bank Ltd v. Dinesh Kumar a/l Jashbhai Nagjibhai & Ors* [2002] 3 CLJ 108 HC;

(2) *OCBC Bank (M) Bhd & Anor v. Livision Sdn Bhd & Ors* [2001] 5 CLJ 433;

(3) *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241;

(4) *Asia Commercial Finance (M) Bhd v. Island Rentals Sdn Bhd & Ors* [1999] 4 CLJ 441; and

(5) *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32.

[5] In contending that the defendant has failed to comply with O. 29 r. 14, plaintiff's learned counsel Miss T.T. Leong relied on the plaintiff's affidavit in reply affirmed on 8 November 2004 wherein exh. NE1 was clear evidence that a copy of the default judgment was sent to and received by the defendant in 1998, and that the defendant had not given any explanation for the delay, citing:

(1) *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* [2003] 4 CLJ 533;

(2) *Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 CLJ 335 CA; and

(3) *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 CA.

[6] In my judgment, I would first refer to p. 43 of the appeal record which is the plaintiff's letter sent by way of certificate of posting on 13 February 1998 enclosing a copy of the default judgment to, *inter alia*, the defendant at the defendant's address which is identical to that given by the defendant in his own affidavit at p. 14 of the same; and the guarantee at p. 47 thereof executed by the defendant in favour of the plaintiff. I am therefore unable to accept the defendant's submission that the defendant had not received the default judgment.

[7] Order 29 r. 14 (= O. 42 r. 13 of the Rules of the High Court 1980) where relevant reads as follows:

> 14. Where in these rules provisions are made for the setting aside ... of any judgment, a party intending to set aside ... such judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the ... judgment.

[8] A plain reading of O. 29 r. 14 makes it abundantly clear that the defendant who wishes to set aside the default judgment obtained against him must make the application and serve it on the plaintiff within 30 days after 13 February 1998, when the judgment was sent by way of certificate of posting to his address.

[9] It is significant to note that the defendant made the application and served it on the plaintiff on 5 October 2004 only, thereby occasioning an inordinate delay of 6½ years.

[10] The defendant has to render a satisfactory explanation for the inordinate delay, having regard to the facts and circumstances of each case.

[11] In *Khor Cheng Wah, supra,* the defendant's delay by placing the conduct of his defence in the hands of the solicitor who did little to protect his interest, was held not to be a reasonable explanation: per Gopal Sri Ram JCA.

[12] In *Koperasi Belia Nasional Bhd, supra,* the defendant sought to set aside an *ex parte* order, a copy of which was served on him on 3 February 1994 but the defendant served the application on the plaintiff on 28 March 1994, after having filed the same on 2 March 1994. I invoked O. 42 r. 13 and dismissed the defendant's application with costs. On appeal, my decision was unanimously affirmed by the Court of Appeal in three judgments respectively delivered by NH Chan JCA (as he then was); Abu Mansor Ali JCA (later FCJ) and Abdul Malek Ahmad JCA (now PCA).

[13] *Koperasi Belia Nasional Bhd, supra,* was in turn followed by another panel of the Court of Appeal in *Ng Han Seng, supra,* where the defendants' application to set aside the judgment was filed outside the time limit prescribed by O. 42 r. 13, in the absence of any explanation for the delay or an application for an extension of time. Nik Hashim JCA (now FCJ) delivering judgment of the court held at p. 536b-d that in such circumstances the merits of the defendants' applications there could not be considered and should be dismissed *in limine.*

[14] For purposes of completeness, the authorities cited for the defendant would now require my consideration.

[15] First, Dinesh Kumar, *supra,* concerns the registrar's dismissal of the first defendant's application to set aside the default judgment entered against him, although the default judgment was not served on the first defendant and he came to know of the judgment when a bankruptcy notice was served on him. On appeal, Abdul Aziz J (now JCA) held that the judgment has to be served on the first defendant, otherwise O. 42 r. 13 would not begin to operate against him and so the application should not have been dismissed on this ground.

[16] Similarly, in *Livision Sdn Bhd, supra,* where the default judgment was never served on the fourth defendant, Zakaria Sam JC (now J) that O. 42 r. 13 would not apply. A

[17] The readily distinguishable feature in *Dinesh Kumar, supra,* and *Livision Sdn Bhd, supra,* is the non-service of the judgment on the respective defendant there, whereas in the instant appeal, there is adequate documentary evidence to show that the judgment has indeed been served on the defendant. B

[18] In *Tuan Haji Ahmed Abdul Rahman, supra,* there had been a spectacular delay of three years before the appellant bestirred himself into applying to the High Court to set aside the default judgment obtained against him. The Federal Court speaking through Edgar Joseph Jr FCJ (as he then was) at p 43B-C found that the default judgment was, by reason of uncertainty, a nullity and so the tardiness or the laches of the appellant was not fatal to his application. At the commencement of the judgment, his Lordship made it absolutely clear that the short point which rose for decision in the appeal concerned the validity of the judgment in default of appearance dated 8 July 1998, adding at p 43D-E that for the avoidance of doubt, the issue of delay before the Federal Court has been determined without regard to O. 42 r. 13 which came into force on 1 August 1993 by virtue of PU(A) 192/ 93. C D E

[19] My analysis of the Federal Court judgment leads me to the conclusion that the *ratio decidendi* is to be culled from the finding by the Federal Court that the default judgment obtained in the High Court was a nullity and the issue of delay was included in the discussion by way of *obiter dictum*. F

[20] In *Island Rentals Sdn Bhd, supra,* the defendant had on 5 December 1995 applied to set aside a default judgment obtained against him more than eight years ie, on 9 May 1987. Wan Adnan Muhamad J held, *inter alia,* the delay could not be a reason to dismiss the application to set aside the default judgment. G H

[21] In *Fira Development, supra,* the plaintiffs' sued the defendants' to recover money arising from dishonoured cheques. On 7 January 1986, plaintiffs' obtained judgment in default of appearance. On 21 March 1986, the defendants applied by way of summons in chambers to, *inter alia,* set aside the default judgment. The High Court judge dismissed the application on the ground, *inter alia,* of delay. The Federal Court through the judgment of Lee Hun Hoe I

A CJ (Borneo) (as he then was) in dealing with the issue of delay held that the first instance judge would have to consider the merits of the case, adding that as to delay, there was no rigid rule that an applicant must satisfy the court that there was a reasonable explanation.

B

[22] I would with the utmost respect mention that the aforesaid two judgments were not decided on the basis of O. 42 r. 13, which constitutes a distinguishing feature before me.

C **[23]** I am of the view that none of the authorities cited for the defendant could render any assistance to the defendant.

Service Of Summons

[24] It was stressed for the defendant that the summons had D not been duly served on the defendant as the signature on the A.R. card was not the defendant's signature, as a result of which the judgment obtained by the plaintiff was not a regular judgment.

[25] The plaintiff's response was that the plaintiff has duly served E the summons on the defendant who was also informed of the mention date ie, 8 January 1998 *vide* letter dated 23 February 1997 issued by the plaintiff's solicitors; and that it was immaterial whether the defendant has acknowledged the A.R. card, citing *Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor* [2003] 6 CLJ 326 HC; and *MBF Finance Bhd v. Tiong Kieng Seng* [2001] 4 CLJ F 38 HC.

[26] Having regard to the above submissions, I shall now examine the issue of the plaintiff's service of the summons on the defendant pursuant to which the default judgment was obtained G on 8 January 1998. There is no doubt in my mind that the plaintiff has duly informed the defendant of the mention date ie, 8 January 1998 (see para 8(b) of the plaintiff's affidavit exh NE3 at pp 38, 49 and 50 of the appeal record). Further, the defendant has not replied to the plaintiff's affidavit and is deemed to have H admitted it: see *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609.

[27] The relevant facts reveal that the plaintiff has, pursuant to O. 7 r. 1(1), *vide* solicitors' A.R. registered letter dated 10 I November 1997 served the summons on the defendant at the defendant's own address. Order 7 r. 1(1) is in *pari materia* with O. 10 r. 1(1) of the Rules of the High Court 1980.

[28] The issue pertaining to the absence of the defendant's signature on the A.R. card has indeed been resolved by our courts. A

[29] In *Pengkalen Concrete, supra,* the writs were served by the plaintiff on the defendants by way of A.R. registered letter. The A.R. card had been returned with the name "Yanti" inscribed on it whilst the defendants' names were far from that; thus someone else had acknowledged the said A.R. card. Suriyadi J referred to O. 10 r. 1(1) which where relevant reads: B

> Subject to the provisions of any written law and these rules, a writ must be served ... or by sending it by prepaid A.R. registered post addressed to the last known address ... C

[30] His Lordship held at pp. 329 and 331 that there was no indication in O. 10 r. 1(1) that the plaintiff must evidentially prove that the named person in the writ must be the very person who had received it and that the recipient being "Yanti" did not vitiate that service, as it was construed that the defendants had constructive notice of the issuance of the summons and so, in the absence of rebuttal evidence, good service of the writ had taken place. D E

[31] In *Tiong Kieng Seng, supra,* which was referred to in *Pengkalen Concrete, supra,* the appellant-plaintiff had effected service of the summons on the respondent-defendant through A.R. registered post at the address provided by the defendant and in the absence of any notification of a change. Clement Skinner J rejected the defendant's argument that he had never been served with or received the summons. His Lordship explained that in postal service, compliance with stipulated rules would suffice to invite the presumption under s. 12 of the Interpretation Act 1967 that service has been effected, as the party resorting to postal service has only to show proof of posting to enable him to rely on the presumption of service, and the written receipt as envisaged by O. 7 r. 7A and procured under the Post Office Rules 1947 showed that the plaintiff had diligently adhered to the Subordinate Courts Rules 1980 pertaining to postal service. F G H

[32] The position in the appeal before me demonstrates a strikingly similar situation in *Pengkalen Concrete, supra,* and *Tiong Kieng Seng, supra.* In the circumstances, I am unable to uphold the submission advanced for the defendant. I

A **Judgment Sum**

[33] It was argued for the defendant that on 8 January 1998 when the plaintiff obtained the judgment in the sum of RM89,812.96 together with interest, the agreement had not been B terminated, as the plaintiff's notice of demand dated 17 January 1997 was to recover instalments of arrears only, and so it is contrary to the guarantee, referring to:

(1) *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619 CA; C

(2) *MBF Finance Bhd v. Cahaya Luas Sdn Bhd & Ors* [2002] 5 CLJ 32;

(3) *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd, supra;* D

(4) *Island Rentals Sdn Bhd, supra,* HC;

(5) *Livision Sdn Bhd, supra,* HC; and

E (6) *C Paul D'Cruz v. Chow Tai Yow & Sons Sdn Bhd* [1998] 4 CLJ Supp 389 HC.

[34] The plaintiff's contention was that the agreement had been automatically terminated when the defendants defaulted in the F payment of the arrears stated in the notice of demand dated 17 January 1997, and that under the guarantee, the defendant is liable for all debts due under the agreement, seeking support in:

(1) *Thambipillai v. Borneo Motors (M) Ltd* [1970] 1 MLJ 70 FC;

G (2) *Colonel Lim Poh Weng & Anor v. Probo Pacific Leasing Pte Ltd* [1993] 3 SLR 662 CA Singapore;

(3) *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305 HC; and

H (4) *Sungai Way Leasing Sdn. Bhd. v. Goh Nai Khoo* [1997] 2 CLJ Supp 541 HC.

[35] On my part, it is essential to examine the rights and obligations of the parties under the agreement and the guarantee I so as to give a definitive answer to the above submissions.

[36] The plaintiff's right to terminate the agreement is to be found in cl. 5(a) of the agreement executed between the plaintiff as owner and the first defendant as hirer and provides, where relevant, as follows:

> 5 If the hirer shall
>
> (a) make default in punctually paying the initial payment or any of the hire rentals or any other sums payable under the Agreement (whether demanded or not), or
>
> (b) ...
>
> (c) ...
>
> then it shall be lawful for the Owner (but without prejudice to the Owner's claim for arrears of hire or damages for breach of Agreement and without discharging any liability of the Hirer to the Owner) without notice to terminate this hiring or by written notice sent (by post or otherwise) to or left at the Hirer's last known address forthwith to determine this hiring and the Owner's consent to the Hirer's possession. ... (emphasis added)

[37] In my view, cl. 5(a) is clear and unambiguous and in construing it, I am duty bound to give effect to the intention of the contracting parties thereto ie, under the circumstances stated therein, the owner may exercise the right to terminate the agreement without any notice.

[38] In *Thambipillai, supra,* cl. 9(a) of the hire-purchase agreement there is substantially similar to cl. 5(a) before me, and where relevant it reads:

> 9. If the hirer shall make default in payment of any monthly sum payable hereunder for seven days after the same shall become due ... it shall be lawful for the owners:
>
> (a) Without notice to terminate the hiring and resume possession of the vehicle and for that purpose to enter upon any premises where the vehicle may be,
>
> (b) and/or by written notice sent (by post or otherwise) to or left at the hirer's last known address forthwith and for all purposes absolutely to determine and end this hiring and thereupon the hirer shall no longer be in possession ...

[39] The Federal Court speaking through Gill FJ (as he then was) held that there was no ambiguity in cl. 9 when read as a whole and under cl. 9(a) the owners were entitled to terminate the hiring without notice.

[40] Further, where a hirer defaulted in the punctual payment of instalments under a hire-purchase agreement (as in the case of the defendant herein) the issue of the writ by the owner (ie, the plaintiff herein) is tantamount to the owner's acceptance of the hirer's repudiation of the agreement: see *Colonel Lim Poh Weng, supra,* per Kartigesu JA at p 666C.

[41] In *Chan Siok Lie & Ors, supra,* the plaintiff had obtained summary judgment against the defendants as guarantors in consideration of the plaintiff granting credit facilities to the plaintiff's customer. It was contended *inter alia* that the plaintiff's notice of demand should state precisely the amount due and owing by the principal debtor so that the guarantor could elect whether to comply with it. Shankar J (later JCA) held *inter alia* that a prior precise demand was not a *sine qua non* to the commencing of an action, as the writ itself is a notice.

[42] In *Goh Nai Khoo, supra,* Jeffrey Tan J held, *inter alia,* the termination of a lease (which I would extend to a hire-purchase in the instant appeal) was not a precondition to the appellant making a demand on the respondent.

[43] For purposes of completeness, I shall now consider the authorities cited for the defendant.

[44] The hire-purchase agreement in *Leong Weng Choon, supra,* does not appear to incorporate a clause corresponding to cl. 5(a) in the instant appeal or cl. 9(a) in *Tambipillai, supra.*

[45] In *Cahaya Luas, supra,* the plaintiff as owner sought and obtained summary judgment against the defendants as hirer under a hire-purchase agreement. On appeal to judge in chambers, it was argued for the defendants that the machinery was bought and owned by the defendants and not the plaintiff before the execution of the hire-purchase agreement. Su Geok Yiam JC (now J) held this to be an arguable defence. The issue pertaining to the interpretation of cl 5(a) before me or cl 9(a) before the Federal Court in *Thambipillai, supra* was not ventilated before her Ladyship.

[46] The fact pattern and the issues raised in *Tuan Haji Ahmed, supra; Island Rentals, supra; Livision Sdn Bhd, supra,* and *C Paul D'Cruz, supra,* respectively, do not revolve around the facts and issues raised in the instant appeal.

[47] I am therefore of the view that the authorities cited for the defendant are not even remotely supportive of the defendant's contention.

[48] I hold that the default judgment is a regular judgment.

Defence On Merits

[49] The defendant proceeded to the defence on merits, on the ground that the agreement is void or voidable, as title to the vehicle in the hire-purchase agreement had already been transferred to the first defendant upon the first defendant paying a sum of RM38,000 as deposit, on the basis of *Low Ping Ming v. MBF Finance Bhd* [2000] 2 CLJ 307 HC; and *Cahaya Luas, supra.*

[50] The plaintiff responded that as the usual practice in a hire-purchase transaction, the defendant's payment of the RM38,000 to the dealer Minsin Machinery Corporation Sdn Bhd was by way of initial payment made on behalf of the plaintiff to purchase the vehicle and not an outright purchase as the RM38,000 was retained by the dealer to whom the plaintiff must make a balance payment of RM92,000. Reference was made, *inter alia,* to:

(1) *MBF Finance Bhd v. Low Ping Ming* [2005] 1 CLJ 305;

(2) *MBF Leasing Sdn Bhd v. Cheok Lai Chen & Anor* [2003] 7 CLJ 186 HC;

(3) *Malayan Credit Ltd v. Mohamed Kassim* [1965] 2 MLJ 134 HC; and

(4) *Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corpn & Anor* [1976] 1 MLJ 83 HC.

[51] In my view, the issue herein is whether the first defendant's payment of the sum of RM38,000 for the vehicle in the agreement results in an outright purchase and the transfer of the title to the first defendant.

[52] In this regard, I shall first consider the defendant's authorities first.

[53] In *Low Ping Ming, supra,* the facts reveal that the plaintiff-hirer had agreed to purchase a vehicle from a dealer Avian Engineering Malaysia Sdn Bhd and had paid a deposit of RM35,000, while the balance was by way of a loan from the defendant-owner in the form of hire-purchase finance. The vehicle was registered in the name of the hirer with ownership claimed by the owner. Meanwhile, they entered into a hire-purchase agreement, and the owner paid a sum of RM160,000 to Avian and that sum with interest was to be paid by the hirer by 59 monthly instalments. The owner subsequently repossessed the machinery as the hirer had defaulted in paying the instalments. The hirer sought a declaration *inter alia* that hire-purchase agreement was invalid, which Steve Shim J (later CJ (Sabah & Sarawak)) granted. This judgment was cited by the defendant's learned counsel who apparently did not have the benefit of reading the Court of Appeal judgment delivered by Augustine Paul JCA (now FCJ) after hearing the appeal therefrom, sub nom *MBF Finance Bhd v. Low Ping Ming, supra*. At pp 312 and 313d-f, his Lordship in holding the agreement as valid explained, *inter alia*, that in a valid hire-purchase agreement, the appellant (defendant) must be the owner at the time of its execution, and the fact that the plaintiff-respondent had paid the initial payment did it make him the owner of the vehicle. (See also *Cheok Lai Chen & Anor, supra; Mohd Kassim, supra; and Credit Corporation (M) Bhd, supra*).

[54] *Cahaya Luas, supra,* has been considered by me above.

[55] In my view, the authorities on which the defendant sought to rely are not conducive to the defendant's contention.

Conclusion

[56] On the above grounds, I hold that the default judgment is a regular judgment to which the defendant has raised no defence on merits. I therefore affirm the decision of the court below and dismiss this appeal with costs.